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No. 16-534

In the
Supreme Court of the United States

JENNY RUBIN, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF FOUNDATION FOR DEFENSE OF DEMOCRACIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE [1]

The Foundation for Defense of Democracies ("FDD") is a non-profit, non-partisan section 501(c)(3) policy institute focusing on foreign policy and national security. Through its Iran Project and other initiatives, FDD conducts extensive research on state sponsorship of terrorism and efforts to combat such terrorism. FDD's nonpartisan research and analysis has been used by Members of Congress, including to develop legislation relating to the scope of Iran's sovereign immunity from attachment and execution to satisfy judgments based on that state's sponsorship of terrorism. FDD also seeks to reduce the amount of oil and other commercial revenues the Iranian regime can devote to supporting terrorism, advancing its illicit nuclear and ballistic missile programs, and repressing its citizens.

FDD has a significant interest in this case because it has provided research, analysis, and expertise to Congress relating to terrorism in general and Iran's state sponsorship of terrorism in particular.

FDD firmly believes that Congress and other branches of the US government should remain resolute in their efforts to hold Iran accountable for sponsoring acts of terrorism against U.S. citizens around the world, and that Iran should not be permitted to shield its assets from terrorism-related judgments.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the Court.

Section 1610(g) of the Foreign Sovereign Immunities Act is instrumental to these efforts.

SUMMARY OF ARGUMENT

Terror victims holding judgments against the Republic of Iran entered under 28 U.S.C. § 1605A, should be empowered to execute against property undisputedly owned directly by Iran (Pet. App. 8) under color of 28 U.S.C. § 1610(g).

1. Section 1610(g) withdraws sovereign immunity from execution on terror judgments for two types of property: (i) "the property of a foreign state" and (ii) "the property of an agency or instrumentality of such a state." The provision makes *both* types of property "subject to . . . execution" on a judgment entered under section 1605A (subject to conditions discussed below).

The simplest and most natural reading of the text of § 1610(g) is that it applies, as written, to "the property of a foreign state," such as the artifacts at issue in this case. "Once a section 1605A judgment is obtained, section 1610(g) strips execution immunity from *all* property of a defendant sovereign." *Weinstein v. Islamic Republic of Iran*, 831 F. 3d 470, 483 (D.C. Cir. 2016) (emphasis by the Court); *see Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.3 (9th Cir. 2010) (with the addition of § 1610(g), "judgment creditors can now reach *any* U.S. property in which Iran has any interest") (emphasis added); *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014) ("[Section] 1610(g) allows attachment of the property of a foreign state").

2. The decision below erroneously read § 1610(g) as doing only a limited task: "it abrogates the *Bancec* rule for terrorism-related judgments" and "is

not itself an exception to execution immunity for terrorism-related judgments," so that the holders of such judgments may only execute on the property of a foreign state if such property is "used for a commercial purpose" and thus available for execution under § 1610(a)(7). Pet. App. 35.

While the lower court correctly observed that § 1610(g) abrogates the "*Bancec* rule" for instrumentalities of state sponsors of terrorism, it incorrectly concluded that § 1610(g) does nothing more.

a. Limiting the text this way would render the portion of § 1610(g) permitting execution against "the property of a foreign state" superfluous. The *Bancec* factors are used for "determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 632 (1983) ("*Bancec*"); *see* Pet. App. 23-26. Those factors are *only* relevant when deciding whether the "normally separate juridical status" of an *instrumentality* of a state must be disregarded. Such a question simply never arises where, as here, the property is owned directly by the *foreign state itself*. The *Bancec* factors are completely irrelevant to execution against the property of an *actual* state (as opposed to an *instrumentality* of the state), so there would be no point to including "the property of a foreign state" in a statutory provision designed *only* to abrogate the *Bancec* rule.

b. The court below grounded its erroneous conclusion on the phrase "as provided in this section," contending that the phrase *had* to be read to incorporate other *substantive* subsections—like

subsection (a)(7)—and that reading the phrase as incorporating *procedural* provisions like subsection (f)(1) would offend the principle of statutory construction against superfluity, because subsection (f) "never became operative." Pet. App. 27, 33 (emphasis omitted). As discussed below, however, the lower court's factual premise was inaccurate. Subsection (f)(2), which requires the Government to assist terror victims in identifying assets, has always been operative. It makes far more sense to read the term "as provided in this section" to embrace *procedural* provisions like subsection (f)(2).

c. The lower court's fundamental error was that it failed to engage in the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

By the time Congress enacted § 1610(g) in 2008, property of a foreign state "used for a commercial activity" had *already* been subject to execution for terror victims holding judgments against state terror sponsors for more than a decade. *See* Pub. L. 104-132, § 221, 110 Stat. 1242-43 (1996) (adding 28 U.S.C. § 1610(a)(7)). No possible purpose would have been served by adding a *second* provision, supposedly benefiting terror victims, that did the exact same thing as § 1610(a)(7).

Viewed in the context of the "many laws enacted over time" concerning this topic, § 1610(g) is best read as *increasing* the power of terror victims to obtain and execute judgments against property owned by state sponsors of terrorism, rather than simply cross-referencing a right that already existed.

Indeed, in *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016), this Court viewed § 1610(g) as "expanding the availability of assets for postjudgment execution," "to make available for execution the property . . . of a foreign state sponsor of terrorism, *or* its agency or instrumentality, to satisfy a judgment against that state." (Emphasis added.)

a. Congress withdrew sovereign immunity from designated state sponsors of terror in 1996. 110 Stat. at 1241. (The Republic of Iran had been so designated in 1984. 49 Fed. Reg. 2836-02 (Jan. 23, 1984).) In that statute, Congress also withdrew sovereign immunity from execution of the property of such states if such property was "used for a commercial activity." 110 Stat. at 1242-43 (adding 28 U.S.C. § 1610(a)(7)).

b. In 1998, Congress amended the Foreign Sovereign Immunities Act ("FSIA") to provide that assets of a state sponsor of terrorism blocked under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1707, could be subject to execution and to instruct the Executive Branch to assist terror victims in identifying assets for execution. *See* Pub. L. 105-277, § 117, 112 Stat. 2681-491 (1998) (adding 28 U.S.C. § 1601(f)). (Iran's assets had been blocked under the IEEPA since 1979. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).) The President immediately exercised his power to waive the blocked asset portion of this new provision (§ 1610(f)(1)), leaving subsection (f)(2) operational. *See* Presidential Determination 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998).

c. In 2002, Congress sharply limited the Presidents' ability to waive the power of terror victims to execute on blocked assets. *See* Terrorism Risk Insurance Act ("TRIA"), Pub. L. 107-297, § 201, 116 Stat. 2322, 2337 (2002).

d. In 2008, Congress added § 1610(g) as part of the National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA"), Pub. L. 110-181, § 1083, 122 Stat. 3, 338. The House Report said that the provision was "written to subject *any* property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." H. R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.) (emphasis added).

In that statutory context, there can be no doubt that the 2008 addition of § 1610(g) was designed to *facilitate* the execution of terror judgments and *expand* the class of state-owned assets available to holders of judgments under § 1605A. Repeatedly, Congress has acted to make the promise of its withdrawal of immunity for state sponsors of terror a reality rather than an illusory promise. The Court should effect that intent, reflected in the text and crystal clear from the series of statutory enactments between 1996 and 2008.

ARGUMENT

I. THE TEXT OF § 1610(g) SUPPORTS A BROAD CONSTRUCTION

Section 1610(g) provides, in part:

> the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including

> property that is a separate juridicial entity or is an interest held directly or indirectly in a separate juridicial entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of [certain factors].

28 U.S.C. § 1610(g). By its terms, subsection (g) does not restrict execution to property used for a "commercial activity." Nor does it make specific reference to other provisions of § 1610 that permit execution of property "used for a commercial activity." Thus, in *Weinstein v. Islamic Republic of Iran*, 831 F. 3d 470, 483 (D.C. Cir. 2016), the court observed quite simply that "[o]nce a section 1605A judgment is obtained, section 1610(g) strips execution immunity from *all* property of a defendant sovereign." (Emphasis by the Court.) Other courts read the statute the same way. *See Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.3 (9th Cir. 2010) (with the addition of § 1610(g), "judgment creditors can now reach *any* U.S. property in which Iran has any interest") (emphasis added); *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014) ("§ 1610(g) allows attachment of the property of a foreign state").

It is true that § 1610(g) includes the phrase "as provided in this section," but that the phrase is best read as a procedural one, rather than an incorporation of other substantive provisions. This was the view of the Ninth Circuit in *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 959 (9th Cir. 2016), which read § 1610(g) as withdrawing sovereign immunity from execution of terror judgments in order to enable terrorism judgment

creditors to enforce their judgments against the property of a state sponsor of terrorism regardless of whether the property is used for commercial activity. Specifically, the phrase "as provided in this section" is best read as referring to the procedures in § 1610(f), which, "like § 1610(g), relates to judgments obtained under § 1605A and its predecessor, § 1605(a)(7). *Bennett*, 825 F.3d at 959. To be sure, the President has waived subsection (f)(1), *see* Presidential Determination 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998), but the President has no power to waive—and has never waived—subsection (f)(2).

The lower court erroneously concluded that a judgment creditor proceeding under § 1610(g) still must satisfy one of the *other* substantive exceptions to execution immunity "as provided" elsewhere in § 1610. Pet. App. 35. In its view, § 1610(g) merely removes the so-called *Bancec* factors for terror judgments. *Id.* (These factors were developed after *Bancec* held that the courts should "determin[e] the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." 462 U.S. at 633. *See* Pet. App. 23-26.) In other words, the lower court said that the only work that § 1610(g) does is to remove the barriers to treating an *instrumentality* of the state as if it were the state, notwithstanding the ordinary rules applied in *Bancec*. Pet. App. 35; *see also Resp. Islamic Republic of Iran* Br. in Opp. at 17; U.S. *Amicus* Br. at 10.

The trouble with this reading of the statute is that it does not give meaning to the phrase "property of a foreign state" in § 1610(g). Before enactment of § 1610(g), the "property of a foreign state" "used for a commercial purpose" was *already* subject to

execution to satisfy a terrorism judgment against the foreign state itself. *See* 28 U.S.C. § 1610(a)(7) (added as part of Pub. L. 104-132, § 221, 110 Stat. 1214, 1242-43 (1996)).

Moreover, the *Bancec* factors are completely irrelevant to "property of a foreign state," because they reflect a standard for determining whether to disregard the separation between a state's instrumentality and the state itself.

Under the lower court's reading of § 1610(g), the phrase "property of a foreign state" would thus be doubly superfluous—it is completely irrelevant to the *Bancec* factors, and it would be adding a right of execution on property that was already subject to execution, and had been for more than a decade. A "court should give effect, if possible, to every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109 (1990).

II. THE PURPOSE OF § 1610(g) AND RELATED PROVISIONS SUPPORTS A BROAD CONSTRUCTION

As Judge Learned Hand explained:

> Of course it is true that the words used . . . are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (Hand, J.). "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). And, where "Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

A. The History of FSIA Amendments Relating to State-Sponsored Terrorism Supports a Broad Construction of § 1610(g)

From the 1996 enactment of the terrorism exception to sovereign immunity through § 1083 of the 2008 NDAA, Congress addressed state-sponsored terrorism six times in twelve years. All this legislative activity marched in the same direction: toward making it easier for terror victims to obtain and execute on judgments against state sponsors of terrorism. These amendments reflect Congress' sustained effort to compensate victims of state-sponsored terrorism, as well as to punish and deter the state sponsors of terrorism perpetrated against U.S. citizens. Put simply, Congress wants state sponsors of terrorism to pay.

In 1996, Congress enacted the FSIA's state-sponsored terrorism exception to immunity. *See* Pub. L. 104-132, § 221, 110 Stat. 1214, 1242-43 (1996). As originally enacted, Section 1605(a)(7) eliminated the immunity of state sponsors of terrorism from suits brought by U.S. nationals seeking money damages for terrorist acts that caused personal injury or death. Congress added Section 1605(a)(7) to the FSIA to "give American citizens an important economic and financial weapon" against state sponsors of terrorism. H.R. Rep. No. 104-383,

at 62 (1995). By that time, Iran was already a designated state sponsor of terrorism, *see* 49 Fed. Reg. 2836-02 (Jan. 23, 1984), and its assets in the United States had been blocked under color of the IEEPA, 50 U.S.C. §§ 1701-1707. *See* Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).

Five months after this amendment, Congress amended the FSIA with the Civil Liability for Acts of State Sponsored Terrorism provision, also known as the Flatow Amendment. The Flatow Amendment, which was named after an American citizen killed in a terrorist attack by a suicide bomber who drove a van full of explosives into a bus in Israel, expanded remedies for victims of state-sponsored terrorism. It enhanced victims' rights by providing for punitive damages, previously unavailable under the statutory scheme of the FSIA. *See* Civil Liability for Acts of State Sponsored Terrorism, Pub. L. 104-208, § 589, 110 Stat. 3009-172 (1996), codified at 28 U.S.C. § 1605 note (2006).

In 1998, Congress amended the FSIA to provide that assets of a state sponsor of terrorism blocked under the IEEPA could be subject to execution or attachment in aid of execution of a judgment against that State. *See* Pub. L. 105-277, § 117, 112 Stat. 2681-491 (1998), codified at 28 U.S.C. § 1601(f)(1)(A). Because of objections from the Executive branch, however, Section 117 also gave the President authority to "waive the requirements of this section in the interest of national security." *Id.* After signing the legislation into law, President Clinton immediately executed the waiver. *See* Presidential Determination 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998).

In 2001, Congress issued a directive to the President to submit "a legislative proposal to establish a comprehensive program to ensure fair, equitable, and prompt compensation for all United States victims of international terrorism (or relatives of deceased United States victims of international terrorism)." Pub. L. 107-77, § 626, 115 Stat. 748, 803 (2001). The House Report noted that this directive was added to do away with "the current ad hoc approach to compensation for victims of international terrorism," because it was "imperative that the Secretary of State, in coordination with the Department of Justice and Treasury and other relevant agencies, develop a legislative proposal that will provide fair and prompt compensation to all U.S. victims of international terrorism." H. R. Rep. No. 107-278, at 170 (2001) (Conf. Rep.).

In 2002, Congress passed and the President signed the Terrorism Risk Insurance Act ("TRIA") into law, making blocked assets of State sponsors of terrorism available to victims to satisfy judgments for compensatory damages. *See* Pub. L. 107-297, § 201, 116 Stat. 2322, 2337 (2002).

Despite these efforts, a number of "practical, legal, and political obstacles" made it "all but impossible for plaintiffs in [] FSIA terrorism cases to enforce their default judgments against Iran." *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49 (D.D.C. 2009).

It was in this context that Congress enacted § 1083 of the 2008 NDAA. Judge Royce Lamberth (who had presided over more than a decade of litigation against the Islamic Republic of Iran under the state sponsor of terrorism exception of the Foreign Sovereign Immunities Act) observed that

"the reforms implemented through § 1083 [of the 2008 NDAA] add a number of measures that are intended to help plaintiffs succeed in enforcing court judgments against state sponsors of terrorism, such as Iran." *Iran Terrorism Litig.*, 659 F. Supp. 2d at 36.

In § 1083 of the 2008 NDAA, Congress first addressed significant substantive hurdles faced by terrorist victims exercising their rights in U.S. courts. While some courts had held that Section 1605(a)(7) gave plaintiffs a private right of action against the foreign state itself, other courts determined that the provision applied only to actions against the officials, employees, or agents of a foreign state. *Compare Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F. 3d 82, 87 (D.C. Cir. 2002) (noting that Flatow Amendment could permit cause of action against foreign state) with *Acree v. Republic of Iraq*, 370 F.3d 41, 59 (D.C. Cir. 2004) (holding that neither § 1605(a)(7) nor the Flatow Amendment created cause of action against foreign states themselves); *Dammarell v. Islamic Republic of Iran*, 281 F. Supp. 2d 105, 191-92, 194 (D.D.C. 2003) (concluding that congressional enactments "make clear that Congress intended to create a cause of action against foreign states"). Section 1083 of the 2008 NDAA did away with this problem by replacing Section 1605(a)(7) with an even broader exception, now codified at 28 U.S.C. § 1605A, which again facilitated victims' efforts to reach State assets to satisfy judgments. This new Section 1605A made clear that a designated state sponsor of terrorism could not be immune from any suit brought by a victim of terrorism for an act of terrorism or for providing material support or resources "if such act or provision of material support or resources is

engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605A(a)(1). *See also Owens v. Republic of Sudan*, 864 F.3d 751, 778 (D.C. Cir. 2017) (finding that the "purpose and statutory history of the FSIA terrorism exception" and the "plain meaning of § 1605A(a) grants the courts jurisdiction over claims against designated state sponsors of terrorism that materially support extrajudicial killings committed by nonstate actors.").

Also in § 1083 of the 2008 NDAA, Congress added the new subsection (g) to 28 U.S.C. § 1610. As discussed, § 1610(g) subjects to attachment and execution upon judgment "the property of a foreign state against which a judgment is entered under section 1605A," as well as the property of an agency or instrumentality of such a state, "as provided in this section, regardless of" the *Bancec* factors. *See* 28 U.S.C. § 1610(g)(1).

Directly addressing § 1610(g), Judge Lamberth wrote that "these latest additions to the FSIA demonstrate that Congress remains focused on eliminating those barriers that have made it nearly impossible for plaintiffs in these actions to execute civil judgments against Iran or other state sponsors of terrorism." *Iran Terrorism Litig.*, 659 F. Supp. 2d at 62.

B. Legislative History Supports a Broad Construction of § 1610(g)

The legislative history of § 1610(g) also elucidates the purpose of the provision. Section 1610(g)'s purpose, as explained by the House Committee Report, is to "give claimants who obtain a

judgment against a foreign state recourse to property of the foreign state in execution or attachment in aid of execution of the judgment." The provision "is written to subject *any* property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." H. R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.) (emphasis added). According to Senator Lautenberg, one of the sponsors of the legislation, "[t]he existing law passed by Congress in 1996 has been weakened by recent judicial decisions. This legislation fixes these problems." 154 Cong. Rec. S54 (daily ed. Jan. 22, 2008) (statement of Sen. Lautenberg). *See also id.* at S54-55 ("Congress's original intent behind the 1996 legislation has been muddied by numerous court decisions.").

This statutory amendment, like its predecessors, reflect a dialectic. The Executive Branch and some courts say to terror victims, no, you cannot collect; Congress says, yes you can. Congress' unyielding objective has been to make it possible for terror victims to collect from state sponsors of terrorism.

The legislative history's focus on Iran is also telling. According to Senator Lautenberg, "Congress's support of my provision will now empower victims of [Iranian-sponsored terrorism] to pursue Iran assets to obtain just compensation for their suffering. This is true justice through American rule of law." 154 Cong. Rec. S55. Indeed, Senator Lautenberg referred to Iranian support for terrorism as "inspiration for this new legislation." *Id.*

Since the Iran Hostage Crisis in 1979, Iran has posed a continuous threat to American interests and American lives. Iran-sponsored bombings,

assassinations, hijackings, and hostage-takings over the past four decades years have claimed thousands of victims, and future acts threaten to claim thousands more. This pervasive Iranian threat is virtually without parallel in the modern era, in terms of both its longevity and its intensity. American foreign policymakers understandably have used the means of national power and leverage their disposal to ensure that Iran is held accountable for harming U.S. citizens.

Section 1610(g) cannot be read without recognition of this broader foreign policy objective. The Ninth Circuit correctly recognized that "[g]iven both the text of the statute and Congress' intention to make it easier for victims of terrorism to recover judgments, ... § 1610(g) is a freestanding provision for attaching and executing against assets to satisfy a money judgment premised on a foreign state's act of terrorism." *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 960 (9th Cir. 2016). As the Ninth Circuit explained, "the blinders-on, technical focus of the [opposing] argument loses sight of Congress' main aim, which is for private plaintiffs who suffered torture and obtained tort judgments to get their money from terrorist states." *Id.* at 960 n.5.

Finally, § 1610(g) is a remedial statute. As such, a broad construction is appropriate. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977); *Iran Terrorism Litig.*, 659 F. Supp. 2d at 64.

Reading § 1610(g) as a free standing exception to attachment and execution immunity furthers the core policy goals underlying the law. This reading facilitates efforts by the victims of Iranian-sponsored terrorism to collect on the judgments they have

obtained, and helps ensure that Iran is held responsible for the injuries it has caused.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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